Supreme Court, U.S.
FILED
JUL 8 1996
CLERK

No. 95-1819

In the Supreme Court of the United States

OCTOBER TERM, 1995

EMMA MAE MCDONNELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARLEIGH D. DOVER
EDWARD HIMMELFARB
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a Postal Service employee is entitled to maintain a suit under the Federal Tort Claims Act based on actions that arose out of her employment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

American Postal Workers Union v. *United States Postal Service*, 940 F.2d 704 (D.C. Cir. 1991)	5
Gergick v. *Austin*, 997 F.2d 1237 (8th Cir. 1993), cert. denied, 114 S. Ct. 1536 (1994)	4
Hawaiian Airlines, Inc. v. *Norris*, 114 S. Ct. 2239 (1994)	6
Lindahl v. *OPM*, 470 U.S. 768 (1985)	4
Lingle v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988)	3, 6
McCollum v. *Bolger*, 794 F.2d 602 (11th Cir. 1986), cert. denied, 470 U.S. 1034 (1987)	5
McDaniel v. *United States*, 970 F.2d 194 (6th Cir. 1992)	5
Morales v. *Dep't of the Army*, 947 F.2d 766 (5th Cir. 1991)	4-5
Premachandra v. *United States*, 739 F.2d 392 (8th Cir. 1984)	5
Rivera v. *United States*, 924 F.2d 948 (9th Cir. 1991)	5
Rollins v. *Marsh*, 937 F.2d 134 (5th Cir. 1991)	5
Steele v. *United States*, 19 F.3d 531 (10th Cir. 1994)	4
United States v. *Fausto*, 484 U.S. 439 (1988)	4
Yokum v. *United States Postal Service*, 877 F.2d 276 (4th Cir. 1989)	5

Statutes: Page

Postal Reorganization Act:
39 U.S.C. 201 6
39 U.S.C. 1001-1011 5
39 U.S.C. 1001(b) 6
39 U.S.C. 1005 5
39 U.S.C. 1005(c) 6
39 U.S.C. 1201-1209 5
5 U.S.C. 8116(c) 6

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1819

EMMA MAE MCDONNELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. [C][1]) is unpublished, but the decision is noted at 78 F.3d 581. The opinion of the district court (Pet. App. [B]) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1996. The petition for a writ of certiorari

[1] The appendix to the petition has no page numbering. We have designated the final judgment as App. A, the district court's decision as App. B, and the decision of the court of appeals as App. C. We have also designated page numbers, which appear in this brief inside brackets.

was filed on April 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July, 1992, petitioner, a Postal Service employee, filed a claim with the Secretary of Labor under the Federal Employee Compensation Act (FECA) for injuries to her neck and shoulders, which she sustained in the course of employment. Pet. App. [B3]. Her complaint alleges that, after she filed her FECA claim, she was sometimes not given accommodation for her injury-related limitations and was essentially "locked out" of the acting supervisor program. Compl. ¶¶ 37, 79.

On April 15, 1994, the Postmaster issued petitioner a Notice of Separation-Disability, but the notice was rescinded on August 1, 1994, after petitioner's FECA claim was granted and before the separation became effective. Pet. App. [B3]. While the notice of separation was pending, petitioner filed a union grievance on May 5, 1994, contesting the proposed separation for disability. *Id.* at [B4]. The grievance was denied by an arbitrator. *Ibid.*

While the notice of separation and the related grievance were pending, petitioner filed an administrative claim under the Federal Tort Claims Act (FTCA) on June 17, 1994, seeking $17.5 million in damages. The Postal Service denied the claim on August 12, 1994. Pet. App. [B4].

On October 14, 1994, petitioner commenced this FTCA action in district court, alleging two claims under state law: that the Postal Service harassed her in retaliation for pursuing a claim for a work-related injury (her FECA claim), and that this harassment

amounted to the intentional infliction of emotional distress. Pet. App. [B2].

2. The district court dismissed petitioner's claims, concluding that they were barred (i) because they came within the "discretionary function" exception to the FTCA, Pet. App. [B6-B7], and (ii) because petitioner's "remedy lies instead within the comprehensive remedial scheme set forth in the CSRA and/or her [collective bargaining agreement]," *id.* at [B8]. The court also held that the emotional distress claim was barred by FECA "to the extent it is a work-related 'injury.'" Slip op. at 7.[2] FECA is a "substitute for a tort suit," not a supplement, Pet. App. [B9], and it precludes an action by a federal employee under the FTCA, *id.* at [B10].

3. The court of appeals affirmed. It held, "generally for the reasons given * * * by the district court," that petitioner's FTCA claims were "precluded by the FECA and the Civil Service Reform Act (CSRA) as made applicable to Postal Service employment by the Postal Reorganization Act." Pet. App. [C2]. The court noted that Postal Service employees are federal employees and part of the civil service. It distinguished *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), a non-preemption case, as dealing with "wholly private employment" and "not involv[ing] the FTCA, the

---

[2] The quoted language appears in a portion of the decision that is omitted from the appendix. The omitted portion, which should appear after the end of page [B8], reads as follows: "In addition, Plaintiff's FTCA claim for intentional infliction of emotional distress is also subject to dismissal pursuant to the express terms of the FECA to the extent it is a work-related 'injury.'[1] FECA establishes a workers'". The text would continue at the top of page [B9].

FECA, or the CSRA." Pet. App. [C3]. The court declined to reach the discretionary function issue. *Ibid.*

ARGUMENT

1. In *United States* v. *Fausto*, 484 U.S. 439 (1988), this Court held that the CSRA is the exclusive remedy for federal employees who wish to challenge adverse personnel actions and that such employees are barred from pursuing another remedy even if the CSRA provides them with no remedy at all. The CSRA "'comprehensively overhauled the civil service system,' creating an elaborate 'new framework for evaluating adverse personnel actions against [federal employees].'" *Id.* at 443 (citation omitted) (quoting *Lindahl* v. *OPM*, 470 U.S. 768, 773, 774 (1985)). "It prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review." *Fausto*, 484 U.S. at 443. As this Court has recognized, "[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action" with "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.* at 444, 445.

The courts of appeals have uniformly held that a federal employee governed by the CSRA may not pursue an employment-related claim under the Federal Tort Claims Act (FTCA). See, *e.g.*, *Steele* v. *United States*, 19 F.3d 531, 532 (10th Cir. 1994); *Gergick* v. *Austin*, 997 F.2d 1237, 1239 (8th Cir. 1993), cert. denied, 114 S. Ct. 1536 (1994); *Morales* v. *Dep't of the*

Army, 947 F.2d 766, 768 (5th Cir. 1991); *Rollins* v. *Marsh*, 937 F.2d 134, 139-140 (5th Cir. 1991); *Rivera* v. *United States*, 924 F.2d 948, 951-952 (9th Cir. 1991); *Premachandra* v. *United States*, 739 F.2d 392, 394 (8th Cir. 1984) (pre-*Fausto* decision) ("in enacting the civil service laws, Congress addressed the problem of wrongful termination decisions, and determined which consequential harms ought to be recompensed").[3]

The Postal Reorganization Act, 39 U.S.C. 1001-1011, 1201-1209, incorporates parts of the CSRA, as well as the FECA. See 39 U.S.C. 1005. Accordingly, the same rules barring FTCA actions by federal employees have been held to apply to Postal Service employees whose employment rights are spelled out in a collective bargaining agreement under Sections 1201-1209. See *American Postal Workers Union* v. *United States Postal Service*, 940 F.2d 704, 708-709 (D.C. Cir. 1991). The FTCA "cannot co-exist with a comprehensive employment relations scheme" such as the Postal Reorganization Act. *Id.* at 708. See *McCollum* v. *Bolger*, 794 F.2d 602, 607 (11th Cir. 1986), cert. denied, 479 U.S. 1034 (1987) (Postal Service employees are "governed by a comprehensive procedural and substantive system that provides an adequate remedy"); see also *Yokum* v. *United States Postal Service*, 877 F.2d 276, 278 (4th Cir. 1989) ("nonpreference eligible Postal Service employees have neither a statutory nor nonstatutory right to judicial review of adverse personnel actions"). Here, petitioner availed herself of the remedies she had under the collective bargaining agreement, Pet. App. [B4], and she

---

[3] The Sixth Circuit has reserved the question. *McDaniel* v. *United States*, 970 F.2d 194, 198 (6th Cir. 1992) (per curiam).

was barred from bringing an FTCA claim arising out of her employment relationship with the Postal Service.[4]

2. Petitioner's principal argument is that, rather than applying the rules barring federal employees from suing under the FTCA, the Court should extend the private-sector non-preemption rules of *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), and *Hawaiian Airlines, Inc.* v. *Norris*, 114 S. Ct. 2239 (1994), to Postal Service employees. Pet. 8. That argument is without merit.

Petitioner's argument turns upon her description of the Postal Service employee as a "hybrid" and "not truly a full federal employee." Pet. 11. This characterization conflicts with the plain language of the statutes that govern the Postal Service and its employees. See 39 U.S.C. 201 (the Postal Service is "an independent establishment of the executive branch of the Government of the United States"); 39 U.S.C. 1001(b) ("Officers and employees of the Postal Service (other than those individuals appointed under sections 202, 204, and 1001(c) of this title) shall be in the postal career service, which shall be a part of the civil service."). Unlike the private-sector employees in *Hawaiian Airlines* and *Lingle*, Postal Service employees work for the federal government. Those

---

[4] To the extent petitioner seeks compensation for physical and emotional injuries from on-the-job harassment covered by FECA, she is also barred from bringing an FTCA action because FECA expressly bars such a suit, as the court of appeals correctly held. Pet. App. [C2]. See 39 U.S.C. 1005(c) (incorporating FECA for Postal Service officers and employees); 5 U.S.C. 8116(c) (provision of FECA prohibiting suits against the United States or instrumentality brought "under a Federal tort liability statute").

cases, therefore, do not apply in—and should not be extended to—this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARLEIGH D. DOVER
EDWARD HIMMELFARB
Attorneys

JULY 1996